LIM KHEAK TEONG

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS LP
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CRIMINAL APPLICATION NO. 12 OF 1983]
22 JUNE 1984

CRIMINAL PROCEDURE: *Appeal against acquittal on questions of fact - Power of appellate Court - Matters to be considered - Courts of Judicature Act 1964, s. 66.*

EVIDENCE: *Burden of proof - Whether it ever shifts to the defendant.*

The applicant was charged in the Sessions Court, Kuala Lumpur, on two counts under s. 4(c) of the Prevention of Corruption Act 1961. At the close of the prosecution case the President called for the defence in respect of both charges. After hearing the defence, the President acquitted the applicant of both charges on the ground that the applicant had succeeded in giving an explanation consistent with his innocence and had raised a reasonable doubt on the prosecution's case. The President accepted the applicant's explanation regarding the incorrect entries given in his subsistence allowances claims that it was an honest mistake. The prosecution appealed.

The High Court Judge holding that the President had misdirected himself on the explanation of the applicant and that there was no question of genuine mistake, substituted a conviction in respect of both charges.

The applicant submitted certain questions to the Federal Court for leave under s. 66 of the Courts of Judicature Act 1964. Leave was granted for one question reframed by the Court, as to whether the High Court could substitute its own finding for that of a Subordinate Court in an appeal against acquittal raising only questions of fact, where there was evidence to support the defence and where there was no misdirection.

Held:

[1] The answer to the question must be in the negative. Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court should not come to a different conclusion on the evidence unless it is satisfied that the advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion:

[2] The ruling of the High Court Judge on the burden of the defence, the Judge purporting to follow Terrel, Ag. CJ in *Rex v. Low Toh Cheng* [1941] 10 MLJ 1 @ 2, was in conflict with rulings already made in similar jurisdictions. It is sufficient for the accused to cast a doubt on the prosecution case. From the beginning to the end of a case the burden remains upon the prosecution to prove the guilt of the accused.

[Appeal allowed. Conviction set aside. Acquittal restored.]

Cases referred to:
Rex v. Low Toh Cheng [1941] 10 MLJ 1
Sheo Swarup v. King-Emperor [1934] AIR PC 227
Benmax v. Austin Motor Co. Ltd. [1955] AC 370
Thomas v. Thomas [1947] 1 All ER 582
Mat v. PP [1963] 29 MLJ 263
Nadarasa v. PP [1972] *2 MLJ 47*
Rajoo v. Rex [1949] 15 MLJ 250

Legislation referred to:
Prevention of Corruption Act 1961, s. 4(c)

For the applicant - Balasingam; M/s. Joseph & Son
For the respondent - Mokhtar Abdullah, SFC

JUDGMENT

Hashim Yeop Sani FJ:

Applicant was at the material time a news editor of TV Malaysia earning a salary of RM1,250 per mensem. On 25 August 1982 he was charged in the Sessions Court, Kuala Lumpur on two counts under s. 4(c) of the Prevention of Corruption Act 1961. In essence the charges were that he did knowingly use with intent to deceive the Malaysian Government two documents claiming subsistence allowances for two days in December 1975 and January 1976 and the total amount for each claim was RM36.

At the close of the prosecution case the learned President called for the defence in respect of both charges. The applicant gave evidence. In his evidence the applicant did not dispute that the dates mentioned in the charges were incorrect but stated that it was an honest mistake firstly because when he prepared the claims he merely relied on the dates on the new hotel receipts since he had lost the old receipts and secondly he was very busy with his work at that time. His superior who was a prosecution witness (PW3) admitted that applicant was busy during the material period because of shortage of staff.

After hearing the defence learned President acquitted the applicant of both charges. In his judgment the learned President stated that after considering the evidence and after observing the demeanour of the applicant, he found that the applicant had succeeded in giving an explanation consistent with his innocence. He accepted the explanation of the applicant that it was an honest mistake. He also found the applicant had raised a reasonable doubt on the prosecution's case.

On appeal to the High Court the learned Judge in appellate capacity found that there could not be any question of genuine mistake. In his judgment the learned Judge said there could not be any genuine mistake because the applicant was given sufficient time to prepare the claims. He accepted the evidence of pressure of work but held that the pressure of work could not by any stretch of imagination be an excuse to support the defence of genuine mistake. He also rejected the learned President's assessment of the demeanour of the applicant since no particulars was set out as basis of the assessment. Then purporting to rely on *Rex v. Low Toh Cheng* [1941] 10 MLJ 1 at 2 reviewed all the evidence in the appeal record and held that the learned President had misdirected himself on the explanation of the applicant. The appellate Judge then substituted a conviction for the acquittal in respect of both charges.

Mr. Balasingam on behalf of the applicant submitted to us four questions for leave under s. 66 of the Courts of Judicature Act, 1964. All four questions clearly overlapped but central to all these questions was the decision of the appellate Judge to substitute his own finding

on the question of honest mistake for that of the learned President, the finding of the learned President being one substantially of fact. We accordingly allowed leave for one question reframed by us. The question reframed reads as follows:

> In an appeal against acquittal from the decision of a Subordinate Court to the High Court raising only questions of fact, where there is evidence to support the defence and there has been no misdirection by the Subordinate Court can the High Court substitute its own finding for that of the Subordinate Court?

This is an elementary question of law but we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emperor* [1934] AIR PC 227 and secondly purporting to follow Terrel, Ag. CJ in *Rex v. Low Toh Cheng* the appellate Judge went into conflict with the trend of authorities in similar jurisdictions.

With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate Court, in exercising the power conferred "**the High Court should and will always give proper weight and consideration to such matters**" as -

(1) the views of the trial Judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370 at 375, where he quoted from Lord Thankerton's judgment in *Thomas v. Thomas* [1947] 1 All ER 582 that:

> Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

The learned appellate Judge held that the learned President had "misdirected himself on the explanation of the accused." Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was "plainly unsound"? (*Thomas v. Thomas* (*supra*)). On the facts of this case we do not think so.

The ruling of the appellate Judge on the burden of the defence here would therefore seem to be in conflict with rulings already made in similar jurisdictions. We need only mention two. See *Mat v. PP* [1963] 29 MLJ 263, where Suffian J (as he then was) said:

> The correct law for Magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit.

Also *Nadarasa v. PP* [1972] 2 MLJ 47 where Abdul Hamid J (as he then was) said:

> To entitle an accused to an acquittal, it is sufficient if after considering the defence, he has cast a doubt on the prosecution case.

The burden imposed on the defence is a topic much discussed and has become trite law. The principles involved have been consistently followed in this country for nearly half a century and they were succintly stated in the judgment of the Court of Appeal in *Rajoo v. Rex* [1949] 15 MLJ 250. There the direction given by the trial Judge on the burden imposed on the two accused was that "they do not have to prove it with the same strictness, but it is for them to give a reasonable explanation." The Court of Appeal rejected this as a correct direction and held that:

> We say that this direction was inadequate because it failed to explain to the jury that if they thought that the appellant had given an explanation which might reasonably be true, even though they were not convinced of its truth, that would mean that the prosecution had, upon the whole of the case, left them in a state of doubt and so had failed to discharge their burden of proving the accused's guilt. We further say that the direction was incorrect because to say that the accused "do not have to prove it with the same strictness" is to imply that they have to prove their case in some way which is not so strict and that the burden of proof has to some extent shifted to the accused. This is not correct. From the beginning of the case until the end the burden remains upon the prosecution to prove the guilt of the accused.

Thus our answer to the question posed in this reference must therefore be in the negative.

Conviction set aside and the acquittal entered by the learned President restored for each of the charges.

Also found at [1984] 2 CLJ 219